No. 78-1661

In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES RICHARD CECIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 6-12) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1979. A petition for rehearing was denied on April 3, 1979. The petition for a writ of certiorari was filed on May 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars the prosecution of petitioner on a charge of distributing

cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2, after his acquittal on a charge of possessing the cocaine with intent to distribute it.

STATUTES INVOLVED

18 U.S.C. 2(a) provides:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

21 U.S.C. 841(a)(1) provides:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

STATEMENT

On May 11, 1978, petitioner was arrested at the scene of a transaction involving the sale of cocaine to undercover narcotics agents (Pet. 3). In the initial indictment arising out of that incident, petitioner was charged with having possessed cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Pet. App. 1). Following a non-jury trial in the United States District Court for the District of Colorado, petitioner was acquitted of that charge. The district court stated that the evidence showed that petitioner aided and abetted the cocaine distribution but that it "did not show guilt of possession—either actual or constructive—or guilt of aiding and abetting possession with intent to distribute" (Pet. App. 3). The court pointed out that the acquittal was necessitated by the limited nature of the charge set forth in the indictment, although it had been

demonstrated beyond a reasonable doubt that petitioner had aided and abetted the distribution of cocaine, in violation of Section 841(a)(1). The court stated (Pet. App. 2-3):

> [Petitioner] is not charged with distribution of cocaine or aiding and abetting its distribution, something I think the evidence showed him to be guilty of beyond a reasonable doubt.
>
> * * * * *
>
> The evidence in this case demonstrated to my satisfaction beyond a reasonable doubt that [petitioner] aided and abetted the distribution of cocaine, but that isn't what he was charged with.

Two weeks later a second indictment was returned against petitioner, charging in one count that he both possessed the cocaine with intent to distribute it, and that he distributed it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Pet. App. 5). Prior to trial on this indictment, petitioner moved to dismiss the prosecution on double jeopardy grounds. The district court denied the motion, and petitioner appealed. See *Abney* v. *United States*, 431 U.S. 651 (1977). The court of appeals affirmed the district court's ruling in part and reversed in part, holding that while "[t]he first part of the charge in the present indictment [possession of cocaine with intent to distribute it] is obviously barred" by the prior acquittal, the offense of distribution is not barred (Pet. App. 11). That portion of the indictment charges a separate and distinct crime, the court held, and trial on that charge would not violate the Double Jeopardy Clause (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 4-6) that the instant prosecution for distribution of cocaine is barred by the

Double Jeopardy Clause in view of his prior acquittal of possession of cocaine with intent to distribute it. The court of appeals correctly rejected that contention because possession of cocaine with intent to distribute it and distribution of cocaine are separate offenses, and because under the somewhat unusual circumstances of this case, petitioner's acquittal on the possession charge created no collateral estoppel consequences in the subsequent prosecution for aiding and abetting the distribution of cocaine.

The Double Jeopardy Clause does not ordinarily bar separate punishments or successive prosecutions for separate and distinct offenses, even when they arise out of a related course of conduct. See *Brown* v. *Ohio*, 432 U.S. 161, 164-169 (1977). The principal test for determining whether given conduct constitutes two offenses for double jeopardy purposes was stated in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932); it is satisfied "[i]f each [offense] requires proof of a fact that the other does not, * * * notwithstanding a substantial overlap in the proof offered to establish the crimes." *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975).

The offenses involved in this case meet that test. A charge of possession with intent to distribute requires proof of actual or constructive possession but does not require proof of actual distribution. A charge of distribution requires proof of actual distribution but does not require proof of actual or constructive possession. Thus, a person can be guilty of distributing a controlled substance by aiding and abetting those directly involved in the transaction (and be thus punishable as a principal under 18 U.S.C. 2) without having actual or constructive possession of the controlled substances. And most courts of appeals have held that possession with intent to distribute and distribution are separate offenses that may

be separately charged. *United States* v. *Henciar*, 568 F. 2d 489 (6th Cir. 1977), cert. denied, 435 U.S. 953 (1978); *United States* v. *Oropeza*, 564 F. 2d 316, 323-324 (9th Cir. 1977), cert. denied, 434 U.S. 1080 (1978); *United States* v. *Jackson*, 526 F. 2d 1236 (5th Cir. 1976); *United States* v. *Stevens*, 521 F. 2d 334, 337 n.2 (6th Cir. 1975).

Usually, the evidence of distribution will also show possession with intent to distribute—*e.g.*, where the evidence simply shows a sale of a controlled substance by the defendant. In those circumstances, where the evidence merely shows that the possession ripened into the distribution, the courts of appeals have applied the rule of lenity set forth in such cases as *Prince* v. *United States*, 352 U.S. 322 (1957), to prohibit multiple punishments for the two offenses, although recognizing them to be separate offenses. *United States* v. *Hernandez*, 591 F. 2d 1019 (5th Cir. 1979); *United States* v. *Henciar, supra*; *United States* v. *Oropeza, supra*; *United States* v. *Olivas*, 558 F. 2d 1366, 1368 (10th Cir.), cert. denied, 434 U.S. 866 (1977); *United States* v. *Stevens, supra*; *United States* v. *Atkinson*, 512 F. 2d 1235 (4th Cir. 1975); *United States* v. *Curry*, 512 F. 2d 1299 (4th Cir.), cert. denied, 423 U.S. 832 (1975).[1] Further, in such circumstances, an acquittal

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[1]Petitioner is incorrect in contending (Pet. 5) that the decision below is inconsistent with *United States* v. *Stevens, supra*, and *United States* v. *Atkinson, supra*. Those cases simply held that where the evidence showing distribution was the same as the evidence showing possession, the offenses merged and the rule of lenity precluded separate punishment. Both decisions stressed the nature of the evidence, and *Stevens* expressly recognized that the offenses were separate. See 512 F. 2d at 1240; 521 F. 2d at 337 n.2.

Petitioner is correct that the Seventh Circuit in *United States* v. *Orzechowski*, 547 F. 2d 978 (1976), and a prior decision of the Tenth Circuit, *United States* v. *Herbert*, 502 F. 2d 890 (1974), held that it is not duplicitous to charge possession and distribution in the same count. In those cases, however, the evidence of possession and of distribution was the same and there was thus little risk that a general verdict on the count would have reflected divided opinions among the

on a charge of possession will in all likelihood create a collateral estoppel bar to a subsequent prosecution for distribution. See *Brown* v. *Ohio*, *supra*, 432 U.S. at 166-167 n.6; *Ashe* v. *Swenson*, 397 U.S. 436 (1970).

Neither the rule of lenity nor principles of collateral estoppel, however, bar a subsequent prosecution for distribution where the evidence of distribution does not also show the defendant's possession with intent to distribute and where it is clear that the acquittal on a charge of possessing the drugs in question was not based on a factual determination inconsistent with a determination that the defendant aided and abetted the distribution. In this case there is no question that the acquittal on the possession charge was based on a determination consistent with a finding that petitioner was guilty of distribution, because the factfinder expressly so stated when it acquitted petitioner on the possession charge. See page 3, *supra*. Because the offenses are separate and because on the facts of this case there is no collateral estoppel bar to the second prosecution, the court of appeals properly rejected petitioner's double jeopardy claim.[2]

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jury as to the offenses shown by the evidence, which is the risk that the duplicity rule is designed to avoid. It is not clear whether those courts concluded that possession and distribution could never be regarded as separate offenses.

[2]Petitioner erroneously relies (Pet. 4-5) on *Sanabria* v. *United States*, 437 U.S. 54 (1978), for the proposition that one statute cannot establish separate offenses for Double Jeopardy purposes. *Sanabria* suggested no such proposition. In that case, the Court held that the allowable unit of prosecution under 18 U.S.C. 1955 was conducting an "illegal gambling business," and that the offense could not be divided into multiple offenses for each of the different types of gambling conducted by the business. 437 U.S. at 69-74. But the relevant question is identification of the allowable unit of prosecution that Congress intended to establish. It is immaterial whether

This is one of a relatively small class of cases in which the prosecutor initially misapprehends the legal consequences of the facts that will be proved at trial or misconstrues the legal implications of the statute under which a criminal charge is first brought, with the result that the first trial is terminated in the defendant's favor, and the conduct is made the subject of a second indictment charging the correct offense. While such mistakes by the prosecutor are regrettable, the courts have concluded that there is no double jeopardy bar to the second prosecution in such circumstances unless dictated by principles of res judicata or collateral estoppel. See, *e.g.*, *United States* v. *Kehoe*, 579 F. 2d 971 (5th Cir. 1978), cert. denied, Nos. 78-802 and 78-803 (Feb. 21, 1979); *United States* v. *Shelton*, 573 F. 2d 917 (6th Cir.), cert. denied, No. 77-1664 (Oct. 2, 1978); cf. *Lee* v. *United States*, 432 U.S. 23 (1977). Since, as shown above, the reprosecution of petitioner is barred neither by res judicata (the present charge being a legally distinct offense) nor by collateral estoppel, there is no occasion for further review in this case.[3]

Congress has used one or more statutes, or sections, or subsections, to establish different permissible units. The Internal Revenue Code may be said to be a "single statute", but it describes many distinct offenses. Thus, in the footnote on which petitioner relies (437 U.S. at 70 n.24), the Court in *Sanabria* distinguished that case from "decisions permitting prosecution under statutes defining as the criminal offense a discrete act, after a prior conviction or acquittal of a distinguishable discrete act that is a separate violation of the statute." As we have noted, most courts of appeals have held that possession with intent to distribute and distribution are distinguishable discrete acts under 21 U.S.C. 841(a)(1).

[3]If the Double Jeopardy Clause were construed to bar a retrial on a proper charge after a first trial under an incorrect charge, the benefits to the relatively few defendants in petitioner's position would be considerably outweighed by the effect of such a rule in prompting prosecutors to include in the initial indictment a larger number of

2. Petitioner also urges (Pet. 6) that the instant prosecution should be barred because the Double Jeopardy Clause requires the prosecution in one proceeding of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." See *Ashe* v. *Swenson, supra,* 397 U.S. at 453-454 (Brennan, J., concurring). This broad view of the Double Jeopardy Clause, however, has never been accepted by this Court. See *Brown* v. *Ohio, supra,* 432 U.S. at 166-167 & n.6.

3. Although recognizing that the court of appeals has barred retrial on that portion of the second indictment that refers to the possession offense of which he was previously acquitted, petitioner argues that trial on the distribution portion of the offense alone would constitute an impermissible amendment of the indictment (Pet. 5-6). That contention is incorrect. An indictment is not amended when the court withdraws a portion of it from the jury's consideration and submits the case to the jury on what remains. See *Salinger* v. *United States,* 272 U.S. 542 (1926); *United States* v. *Prior,* 546 F. 2d 1254, 1257 (5th Cir. 1977) (collecting cases). In any case, this issue is not appropriately presented for review at this time. This claim is not founded upon the Double Jeopardy Clause and thus does not implicate any requirement for pretrial

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charges than would otherwise be deemed necessary in order to guard against the consequences of a mistake—a practice that, while constitutionally unassailable, would work to the detriment of large numbers of defendants.

We further note that in cases like the present one, where a second trial is to be had for offenses arising out of the same transaction as was the subject of the first trial, the need for the propriety of a second trial is reviewed by the Department under its "*Petite* policy." In the present case, the Assistant Attorney General has authorized the prosecution of petitioner for aiding and abetting the distribution of narcotics.

review. Cf. *Abney* v. *United States, supra.* If petitioner is convicted on the distribution portion of the indictment, he may raise at that time any objection to the district court's handling of the indictment as well as any other allegation of trial error. Cf. *Cobbledick* v. *United States,* 309 U.S. 323 (1940).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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